

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9450

United States Court of Appeals

DISTRICT OF COLUMBIA

CHARLES BRANCH, JR., ALIAS CHARLES MAJOR BRANCH,
APPELLANT

v.

UNITED STATES OF AMERICA APPELLEE

546

BRIEF FOR APPELLEE

GEORGE MORRIS FAY,
United States Attorney.

JOHN D. LANE,
Assistant United States Attorney.

ROBERT E. SHORT,
Assistant United States Attorney.

*United States Court of Appeals
for the District of Columbia
Circuit*

FILED OCT 18 1948

Joseph W. Stewart

CLERK

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(I)

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9450

**CHARLES BRANCH, JR., ALIAS CHARLES MAJOR BRANCH,
APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

This is an appeal from a conviction of the crimes of house-breaking and petit larceny (TR. 85, 87). A motion for a new trial was denied and appellant was sentenced on November 27, 1946, to imprisonment for a period of four months to one year and one day, the sentence to run concurrently with a sentence then being served (TR. 88, 89, 90). From this conviction and sentence the appellant has taken this appeal.

The facts shown at the trial are, in substance, as follows: about 3:00 A. M. on August 14, 1946, one Joseph Moore, the complainant, went to his room at 1211 U Street, NW., and shortly after he had retired, he was awakened by someone prowling about his room. He called out "Who is it?" and the prowler answered, "Does Julius live here?" Moore replied in the negative and was then asked if "He (Moore) had the room since 9:00 o'clock?" Moore retorted that he lived in the room. The intruder stated that he was sorry and started out. When the door was opened the light from the hall shown on him and Moore recognized the prowler as the appellant, Charles Branch, Jr., whom he had known for some time. At this point Moore

jumped out of bed and followed him down the steps demanding to know what the appellant was doing in his room. He received no reply. Moore was prevented from pursuing him further than the street door because he was not properly clothed. On returning to his room Moore discovered that \$18.00 was missing from his trouser pocket. He reported the incident to the police and subsequently heard Branch questioned about the above incident. Moore was present when the appellant denied the allegation although he admitted knowing Moore.

The arresting officer, Ernest Amos, the only other Government witness, testified that he arrested the appellant and questioned him at the Police Precinct. Amos said appellant denied having anything to do with the crime, insisting that he was home in bed at the time. He did, however, admit knowing Moore and was familiar with his residence.

The appellant relied on his alibi, i. e., that he was home and in bed asleep at the time the crime was committed. His mother testified that he was sleeping in his room at 1732 First Street, NW., at the time in question. She was positive in her recollection because she said that this was the same night that her other son, a Lieutenant in the Army, returned to his overseas post and that it was also the night that a roomer in her house, Wallace Ligon, assisted her in moving a couch to another address. Ligon corroborated the testimony of Mrs. Branch, stating that he had moved the couch for her after attending the fights held at the Ball Park. The Government, in rebuttal, introduced Official Records of the District of Columbia Boxing Commission which showed that the only professional fights held at the Ball Park during the week in question were on the 12th day of August (TR. 44, 45, 47, 48, 49)—the alleged crime having been committed on August 14th.

After the Government's rebuttal, the trial judge permitted defense counsel to reopen the case and the appellant took the stand in his own defense. He said that he was home asleep at the time of the alleged crime. During direct examination he volunteered that he was on parole and hence at home by 11:00 o'clock as required by the regulations of the Parole Board. He further stated in answer to a question on direct

examination that "I told my mother about the different accusations that were being placed about me" (TR. 54).

On cross-examination the appellant admitted to being on parole from a conviction in 1942 of forgery of a United States Government check. Then the following occurred:

Cross-examination By Mr. BURKE (Government Counsel):

Q. You say there are many offenses you have been charged with?

A. A few that I know of. I understand they are against me. That is all I know.

Q. How many times have you been charged?

A. Well I was charged——

Mr. MITCHELL. I will object to that.

The COURT. He volunteered the information in answer to a question in direct examination.

Mr. MITCHELL. He has already answered the question in substance. He said there were many.

The COURT. I will allow the question.

The WITNESS. I am glad to tell the court that I was charged with 35 charges of housebreaking in one week-end. Can you imagine that? Can you imagine a man working on the railroad charged with 35 housebreakings on one week-end, and now when I come to court I only have three?

By Mr. BURKE (Government Counsel):

Q. You know you are indicted for four cases don't you?

A. I meant to say I have only four (TR. 55, 56).

In arguing the case to the jury, defense counsel, in order to show that appellant was being persecuted, said, "He told you the truth, that an Officer under oath testified that he had 35 cases against him, and it wasn't until later that they even had one. But why was that done? That is persecution and that is all there is to this case. That is the only thing there is to it. If there were anything more at the outset, why weren't proper steps taken? I ask you that" (TR. 70). In rebuttal, the prose-

cutor replied to the accusations as follows "When Counsel says persecution, I say prosecution. When he says we don't have a case, I say what about the other cases which he has mentioned. He says that is just persecution. We have reduced the charges against this man to four cases" (TR. 73). At this point counsel for the defendant objected on the ground that "there has never been any 35 charges against this man" (TR. 74). Whereupon the following occurred:

The COURT. I do not think we will rely on that.

Mr. BURKE. May counsel's argument be ignored in that regard? He said it was persecution to place 35 charges against the man.

The COURT. It is not persecution if there are charges against this defendant. I do not know how many charges there are against this man and I am not interested because we are trying only this one charge (TR. 74).

After argument and the court's charge, the jury retired and thereafter returned a verdict of guilty as indicated above.

STATUTES INVOLVED

SEC. 22-1801, District of Columbia Code, 1940 ed.:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank or store, warehouse, shops, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel or other watercraft, or railroad car, or any yard where any lumber, coal or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

SEC. 22-2202, District of Columbia Code, 1940 ed.:

Whoever shall feloniously take and carry away any property of value of less than \$50, including things savoring of the reality, shall be fined not more than

\$200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may in his sound discretion, order restitution to be made of the value of the money or the property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

SUMMARY OF ARGUMENT

Cross-examination of appellant in respect to other charges was within the scope of the direct examination and the remarks of the prosecutor in rebuttal were proper and can cast no doubt on the fairness of the trial. As to the appellant's other points, the Government agrees with the *Amicus Curiae* that they are based either on matters outside of the record and hence must be disregarded or are patently without merit.

ARGUMENT

The admission of evidence that the appellant had been charged with other cases of housebreaking similar in their facts to the one for which he was actually tried may have had some effect on the deliberations of the jury. However, the admission of this evidence was not error.

It is elementary that a defendant who takes the stand and testifies in his own behalf may be cross-examined as any other witness. The rules governing cross-examination which are applicable to the instant case were clearly enunciated in *Salerno v. United States*, 61 F. (2d) 419, C. C. A. 8 (1932). The court there said, citing the opinion of the Supreme Court in *Raffel v. United States*, 271 U. S. 494, as follows:

The immunity from giving testimony is one which the defendant may waive by offering himself as a witness [citing cases]. When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. *Reagan v. United States*, 305 ([of 157 U. S.], 15 S. Ct. 610); *Fitzpatrick v. United States*, 178 U. S. 304, 20 S. Ct. 944; *Tucker v. United States* (C. C. A.) 5 F. (2d) 818. He may be examined

for the purpose of impeaching his credibility. *Reagan v. United States, supra*, 305 ([of 157 U. S.], 15 S. Ct. 610); *Fitzpatrick v. United States, supra*, 316 ([of 178 U. S.], 20 S. Ct. 944). His failure to deny or explain evidence of incriminating circumstances of which he may have knowledge may be the basis of adverse inference, and the jury may be so instructed. *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192. His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing.

If, therefore, the questions asked of the defendant were logically relevant, and competent within the scope of the rules of cross-examination, they were proper questions, unless there is some reason of policy in the law of evidence which requires their exclusion.

"The decision in the case of *Tucker v. United States*, 5 F. (2d) 818, which was cited with approval by the Supreme Court, is by the Circuit Court of Appeals for the Eighth Circuit. This court said [page 882 of 5 F. (2d)]:"

"If the accused testifies in his own behalf, manifestly his testimony should be subjected to the same tests for determining its truthfulness as that of any other witness. The primary purpose of cross-examination in the federal courts is to test the truth of the testimony adduced by the direct examination and to clarify or explain the same. It is not to prove independent facts in the case of the cross-examining party. * * *

"We conclude that, when a defendant in a criminal case voluntarily becomes a witness in his own behalf, he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation, but he does not subject himself to cross-examination and impeachment to any greater extent" [citing cases].

The Circuit Court of Appeals for the Fourth Circuit, in *Bolling v. United States*, 18 F. (2d) 863, 865, says:

"* * * Where the accused in a criminal trial voluntarily takes the stand, he is a witness for all purposes, and can be properly cross-examined upon all material matters connected with the particular cases."

This states the rule too broadly, and goes beyond the cases cited as authority for it. A defendant may take the stand, and, by omitting to testify as to incriminating matters unrelated to those matters about which he has testified, prevent the prosecution from cross-examining him fully, subjecting himself, however, to the unfavorable inferences which may be drawn from his failure to make a full disclosure. This is well illustrated by *Caminetti v. United States*, *supra*.

It must also be kept in mind that it is not the specific matters which are mentioned by the defendant in his direct testimony which determine the scope of the cross-examination, but the subject inquired about. "The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject-matter inquired about." *De Witt v. Skinner*, 232 F. 443, 445 (C. C. A. 8).

In view of the foregoing it is clear that once a question of appellant's other charges had been brought up on direct examination, the entire subject matter which was opened up by the direct examination was subject to be inquired into on cross-examination. The appellant, having himself first introduced this evidence into the case in an attempt to lead the jury into thinking that he was being persecuted, cannot now be heard to assert his claim of prejudice simply because the verdict of the jury indicates that his plan went amiss.

It is also elementary that a defendant is subject to having his credibility as a witness impeached the same as any other witness. See *Wigmore on Evidence*, 3rd Edition (1940), Vol. III, Sec. 890; 14 D. C. Code (1940) Sec. 305. Notwithstanding the foregoing, the government is not unmindful of the fact that on cross-examination the appellant could not have been interrogated in respect to mere charges or indictments which had not been ripened into convictions. However, this only applies in the ordinary case where no testimony in respect to other

crimes has been elicited from the witness on direct examination. Clearly the government is not precluded from inquiring into mere arrests and indictments when this subject-matter is introduced into the case for the first time by the defendant-witness himself.

This court has had an opportunity to rule upon a situation closely analogous to that involved in the instant case. In *Beach v. United States*, 80 U. S. App. D. C. 160, 140 F. (2d) 837, 1943, the defendant testified as a witness in her own behalf. She was asked by her own counsel if she had ever been arrested before and she testified that she had not. On cross-examination, government counsel asked her if she had not been arrested for disorderly conduct, to which she replied that she had not. It was held that such a question was clearly within the scope of direct examination and that it constituted nothing prejudicial or improper.

In *Marin v. United States*, 10 F. (2d) 271, C. C. A. 6 (1926), the appellant had been convicted of conspiracy to violate the National Prohibition Act. On appeal he claimed that the trial court had erred in cross-examining him, and in permitting him to be cross-examined in reference to a former indictment against him for a like offense; appellant having testified on direct examination that he had formerly been indicted for a like offense and that the indictment was dismissed. The court held that the cross-examination was proper, and stated in part as follows:

It is further claimed that the court erred in cross-examining, and in permitting the defendant to be cross-examined in reference to a former indictment against him for a like offense. The defendant having testified upon direct examination that he had formerly been indicted for a like offense and that the indictment was dismissed, it was entirely proper to permit him to be cross-examined upon the same subject-matter, if for no other reason than to determine whether he had disclosed upon direct examination all the facts and circumstances in reference to the former indictment, and whether that indictment had in fact been dismissed. It also follows that, the jury having been advised by the testimony of

the defendant upon direct examination that he had been formerly indicted, his cross-examination in reference thereto could not be prejudicial.

In *Payne v. Commonwealth*, 251 Ky. 776, 64 S. W. (2d) 888, the Court of Appeals of Kentucky considered a similar problem in a case where the defendant had been convicted of murder. On direct examination he had testified that he had never been arrested nor had he been in any serious trouble before. The court held that the trial court did not commit error in allowing the prosecutor to cross-examine the defendant in respect of whether or not he had been arrested upon other occasions for disorderly conduct and had been put under a peace bond a week before the killing. The court held that the defendant, having undertaken to establish his good conduct and reputation for peace and quiet by his voluntary statement on direct examination, had opened up the matter of a good behavior. It was therefore proper for the prosecutor to examine him on that question, and, in so doing, to ask concerning specific instances.

In *People v. King*, 13 Cal. 2d 531, 90 Pac. 2d 294 (295), the defendant had taken the stand in his own defense and testified that a short time prior to the robbery and fatal shooting of the deceased, he had engaged in several other hold-ups. On cross-examination the District Attorney brought out, over objection, the location and character of those several hold-ups and further that the defendant on these occasions had employed and flourished the gun here involved. This cross-examination was held proper.

The cases relied upon by the amicus curiae are distinguishable from the instant case in that in the former the evidence in respect of prior arrests was brought out by examination of witnesses other than the defendant.

It follows a fortiori that if the government could properly question, on cross-examination, the appellant in respect to arrests and charges brought to light on direct examination, it could argue this same evidence to the jury in rebuttal. This is especially true in the instant case where the defense counsel strenuously argued that the appellant was being "persecuted."

CONCLUSION

In view of the foregoing it is respectfully submitted that the conviction should be affirmed.

GEORGE MORRIS FAY,
United States Attorney.

JOHN D. LANE,
Assistant United States Attorney.

ROBERT E. SHORT,
Assistant United States Attorney.

JOINT APPENDIX

(11)

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District Court of the United States for the District of Columbia

Criminal No. 77527

UNITED STATES OF AMERICA

v.

CHARLES M. BRANCH, JR., ALIAS CHARLES MAJOR BRANCH

Filed Dec. 16, 1946. Charles E. Stewart, clerk.

United States Court of Appeals for the District of Columbia.

Filed December 18, 1946. Joseph W. Stewart, Clerk.

NOTICE OF APPEAL

Charles M. Branch, Jr., District Jail, 200 19th St. SE.

Offense: Housebreaking and larceny.

Date of judgment: November 27, 1946.

Brief description of judgment or sentence: 4 mos. to 1 yr. and 1 day concurrently with sentence now being served.

Name of prison where now confined, if not on bail: District Jail.

I, the above-named appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

CHARLES M. BRANCH, JR.,
Appellant.

A true copy.

Test:

[SEAL]

CHARLES E. STEWART,
Clerk.

LILLIAN C. BROWN.

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE
FORWARDED UNDER RULE IV

(To accompany duplicate notice of appeal to the United States
Circuit Court of Appeals)

1. Indictment for housebreaking and larceny filed September 9, 1946.

2. Arraignment September 23, 1946.

- Attest:**

LILLIAN C. BROWN.
Clerk.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED
WITHOUT PREPAYMENT OF COSTS

I, Charles M. Branch, Jr., being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

CHARLES M. BRANCH, Jr.
KERMIT A. WEAKLEY.

[SEAL]

Let the defendant proceed on appeal without prepayment of costs.

(S) ALEXANDER HOLTZOFF,
Justice.

A true copy.
Test:

CHARLES E. STEWART,
Clerk.

By LILLIAN C. BROWN,
Deputy Clerk.

G. J. No. 33,358.

CRIMINAL No. 77527.

HOUSEBREAKING AND LARCENY.

Filed in open court. September 9, 1946. Charles E. Stewart, Clerk.

District Court of the United States for the District of Columbia

Holding a Criminal Term

July Term, A. D. 1946

DISTRICT OF COLUMBIA, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Charles Branch, Junior, otherwise known as Charles Major Branch, on, to wit, the fourteenth day of August 1946, and at the District of Columbia aforesaid, the room of one Joseph Moore, there situate, feloniously did enter, with intent to commit therein the crime of larceny, to wit, with intent the goods, chattels, and property in the said room then and there being, feloniously to steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present: That one Charles Branch, Junior, otherwise known as Charles Major Branch, on, to wit, the fourteenth day of August 1946, and at the District of Columbia aforesaid, eighteen dollars in money, of the goods, chattels, money, and property of one Joseph Moore then and there being found in the room referred to in the first count of this indictment, feloniously did steal, take, and carry away; against the form of the

statute in such case made and provided, and against the peace and government of the said United States.

GEO. E. McNEIL,
*Asst. Attorney of the United States,
 in and for the District of Columbia.*

A true bill:

JOHN D. BURRAGE,
Foreman.

District Court of the United States for the District of Columbia

Monday, September 23, 1946

The Court resumes its session pursuant to adjournment:
 Hon. BOLITHA J. LAWS, presiding.

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Curtis Mitchell, Esquire; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon the Court fixed the amount of bond in this case at Five Hundred Dollars (\$500.00).

Tuesday, October 22, 1946

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath say that the defendant is guilty on each count of the indictment; and thereupon said defendant is remanded to the Washington Asylum and Jail, and the case is referred to the Probation Officer of the Court.

Filed October 25, 1946. Charles E. Stewart, Clerk.

MOTION FOR A NEW TRIAL

Comes now the defendant, by his attorney, and moves this Honorable Court to grant a new trial in the above-entitled cause, and for reasons therefor states:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of evidence.
3. That the verdict was contrary to law.
4. That the Court committed error in commenting prejudicially on the evidence.

5. And for such other and further reasons as will be called to the attention of the Court upon a hearing of this motion.

TO: United States Attorney

Please take notice that the above-entitled Motion will be called to the attention of the District Court on this 30th day of October 1946, at 10 a. m., or as soon as Counsel may be heard.

Curtis P. Mitchell,
CURTIS P. MITCHELL,

Friday, November 8, 1946

Come as well the Attorney of the United States, as the defendant in proper person, in custody of the Superintendent of the Washington Asylum and Jail, and by his attorney, Curtis P. Mitchell, Esquire; and thereupon the defendant's motion for a new trial, coming on to be heard, is by the Court denied.

Wednesday, November 27, 1946

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorney, Curtis P. Mitchell, Esquire; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) months to One (1) year and One (1) day; said sentence to run concurrently with sentence now being served.

91 [Filed January 2, 1947. Charles E. Stewart, Clerk.]

Criminal No. 77527

UNITED STATES

v.

CHARLES M. BRANCH

MOTION FOR LEAVE TO WITHDRAW

Comes now, Curtis P. Mitchell, Attorney at Law, who represented the defendant in the above numbered criminal cause and now respectfully request leave of this Honorable Court to withdraw his appearance in said cause and as reason therefor states as follows:

1. That he has talked with the defendant, Charles M. Branch, on several occasions and it has become evident that defendant is not satisfied with defense counsel.

2. That counsel is reliably informed that defendant has filed notice of appeal.

3. That counsel is of the opinion that the verdict appealed from was sound in law and fact and that the appeal is without sufficient legal merit.

In view of the foregoing, counsel is of the opinion that he cannot properly proceed in the defendant's behalf.

Curtis P. Mitchell,

CURTIS P. MITCHELL,

1113 You Street NW., Washington, D. C.

Attorney for Defendant.

DOCKET ENTRY

January 13, 1947, Attorney Curtis P. Mitchell's application to withdraw as counsel for the defendant granted.

Filed January 28, 1947. Charles E. Stewart, Clerk.

Upon oral motion of counsel for the defendant, Hans A. Nathan, Esq., appointed by this Court, it is, this 28th day of January 1947,

ORDERED, that the time for filing the record on appeal in the above-entitled cause be and hereby is extended until the 6th day of March, 1947.

BOLITHA J. LAWS, Justice.

Filed February 6, 1947. Charles E. Stewart, Clerk.

DESIGNATION OF RECORD

The Clerk of the Court will please prepare the record in above entitled cause as follows:

1. The indictment.
2. The verdict.
3. The entry of judgment and sentence.
4. The motion for new trial.
5. The affidavit in forma pauperis to proceed on appeal.
6. The notice of appeal.
7. The order extending the time to file the record on appeal.
8. The transcript of the trial.
9. This designation of record.

Hans A. Nathan,
HANS A. NATHAN,
414 Portland Building,
1129 Vermont Avenue NW.,
Washington 5, D. C., District 3562,
Attorney for Defendant Appellant.

Filed February 14, 1947. Charles E. Stewart, Clerk.

COUNTER DESIGNATION OF RECORD

Comes now the United States by its attorney, the United States Attorney, and designates the following portions of the record for inclusion in the record on appeal:

1. Arraignment and plea of not guilty, September 23, 1946.
2. Motion for leave to withdraw filed by Curtis P. Mitchell, January 2, 1947.
3. Docket Entry showing granting of motion for leave to withdraw.

GEORGE MORRIS FAY,
United States Attorney.

By John D. Lane.

JOHN D. LANE,
Assistant United States Attorney.

97 United States Court of Appeals for the District of
Columbia

ORDER

On consideration of the motion of appellant's counsel to extend the time within which to file the record on appeal in this case, and for leave to withdraw his appearance, and appellant himself having requested that said counsel be allowed to withdraw from the case because appellant wishes to present his own case, It is

Ordered by the Court that the time to file the record on appeal herein be, and it is hereby, extended to and including March 31, 1947; and It is Further

Ordered by the Court that Hans A. Nathan, Esquire, be, and he is hereby, allowed to withdraw his appearance in this case.

PER CURIAM.

[Dated March 8, 1947.]

CHARLES MAJOR BRANCH, JR., the defendant

Direct examination of Mr. MITCHELL:

Q. Do you have a brother?

A. Yes, I do.

Q. What is his name?

A. Lieutenant Julian B. Branch.

Q. Do you know where he is stationed?

A. He is stationed in France. He got married and he took his wife because his wife was in the family way——

Q. (Interposing.) Do you know where he is now stationed?

A. I couldn't say where he is stationed.

Q. Was he home at this time?

A. I couldn't say he was home at that time because I went to see a psychiatrist across the street from me around about 7:30 and I returned home and sat on the porch. I told my mother about the different accusations that were being placed about me and I told the psychiatrist something must be wrong with my mind——

The COURT. You have answered the question.

By Mr. MITCHELL:

Q. Did you see your brother on the 13th?

A. On the 13th, I saw him previous on that day. I knew of him going away that night.

Q. Did you see your mother or father?

A. Yes, I saw my mother and father who told me they were going——

The COURT. You have answered the question.

By Mr. MITCHELL:

Q. Your testimony is you were home asleep at that time, is that correct?

A. Yes, sir.

Mr. MITCHELL. That is all.

Your witness, Mr. Burke.

Cross-examination by Mr. BURKE:

Q. You are on parole from a conviction of forgery of a United States check, aren't you?

A. Yes, sir.

Q. And your parole will be revoked if you are convicted in this case, won't it?

A. Yes, sir.

Q. So you cannot admit that you are guilty of this, can you?

A. No, sir; but I freely gave my testimony. I gave it of my own free will. I wanted the jury to know I gave it that way and never betrayed the trust that was placed in me.

Q. That was in 1942 that you were convicted?

A. Yes.

Q. You say there are many other offenses you have been charged with?

A. A few that I know of. I understand they are against me. That is all I know.

Q. How many times have you been charged?

A. Well, I was charged——

Mr. MITCHELL. I will object to that.

The COURT. He volunteered the information in answer to a question on direct examination.

Mr. MITCHELL. He has already answered the question in substance. He said there were many.

The COURT. I will allow the question.

The WITNESS. I am glad to tell the Court that I was charged with 35 charges of housebreaking in one week end. Can you imagine that? Can you imagine a man working on the railroad charged with 35 housebreakings on one week end, and now when I come to Court I only have three.

By Mr. BURKE:

Q. You know you are indicted for four cases, don't you?

A. I meant to say I have only four. Months elapsed between this time for taking out bond to allow the officers to place the charges and an officer on the police force took the stand and did solemnly swear I had admitted to him 30 charges of robbery; I just came in and tell him I had committed 30 robberies. I am glad to tell that.

Q. These officers charged you with entering people's apartments late at night, didn't they?

A. Yes, they did.

Q. But you couldn't do that because you went home at eleven o'clock?

A. If you are making this a technical question, Prosecuting Attorney, I can't say that because there was time allowed for me on the railroad when I was out of town. That was in May or even a few months before when I was chauffeur to a Mr. Beamer. I had to take him on trips through the mountains, mostly every other Saturday to a club where we remained until two o'clock. I was his personal chauffeur.

* * * * *

Doesn't it also strike you as being singularly odd that here is a man known to policemen for years and known to the defendant for years, and yet the policeman told you he didn't arrest him for ten days, didn't do a thing, and, finally, went out to the ball park to arrest him. Why? Why wait ten days? They know where the man lived.

I will tell you why, because there wasn't anything material to it, but the boy, just as this boy has told you very candidly,

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very honestly, the boy is a victim of persecution. They have bothered him and bothered him back and forth. Yes, he is on parole. He admitted that to you, but every time he turns they lock him up when something happens.

He told you the truth that an officer, under oath, testified he had 35 cases against him, and it wasn't until later that they even had one, but why was that done? That is persecution, and that is all there is to this case, persecution. That is the only thing there is to it. If there were anything more at the outset, why weren't proper steps taken? I ask you that.

* * * * *

Mr. BURKE. If the Court please, members of the jury, the idea of democracy means the Government is run by people whom you cannot fool, but I do not think you can be fooled in this case. When counsel says persecution, I say prosecution. When he says we don't have a case, I say what about the other cases which he has mentioned. He says that is just persecution. We have reduced the charges against this man to four cases.

Mr. MITCHELL. I am going to object to this. There has never been any thirty-five charges against this man.

The COURT. I do not think we will rely on that.

Mr. BURKE. May counsel's argument be ignored in that regard? He said it was persecution to place 35 charges against the man.

The COURT. It is not persecution if there are charges against this defendant. I do not know how many charges there are against this man and I am not interested because we are trying only this one charge.

BRIEF OF AMICUS CURIAE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 9450

*United States Court of Appeals
for the District of Columbia*

FILED JUN 3 1948

Joseph W. Stewart
CLERK

CHARLES BRANCH, JR., alias
CHARLES MAJOR BRANCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

WILLIAM S. TARVER,
509 Albee Building,
Washington, D. C.

Amicus Curiae

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IN THE
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APRIL TERM, 1948
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NO. 9450
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CHARLES BRANCH, JR., alias
CHARLES MAJOR BRANCH,

Appellant,

vs.

UNITED STATES OF AMERICA,
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- - - - -
BRIEF OF AMICUS CURIAE
- - - - -

STATEMENT OF THE CASE

Appellant was convicted October 22, 1946, in the District Court of the United States for the District of Columbia, of housebreaking and petit larceny (Tr. 85, 87). After denial of a motion for a new trial, in which it was contended that the verdict was contrary to the evidence, contrary to the weight of the evidence and contrary to law, and that the court committed error in commenting prejudicially on the evidence, appellant was sentenced on November 27, 1946, to imprisonment for a period of four months to one

year and one day, the sentence to run concurrently with a sentence then being served (Tr. 88, 89, 90).

Two witnesses were produced for the Government, Joseph Moore and Ernest Amos, the latter a detective in the Metropolitan Police Department. Moore testified that he went to his room at 1211 U Street, N. W., a residence hall, at approximately 3 A. M. August 14, 1946, and retired, leaving the door unlocked but closed (Tr. ^{5, 6, 7} 12, ~~58~~, ~~59~~). At approximately 3:30 o'clock the same morning he was awakened by a person in his room. The room was dark and the door was closed. He asked "Who is it?" The intruder answered, "Does Julius live here?" Moore replied in the negative, and the other man asked, "Have you had this room since 9 o'clock?" Moore told him that he lived in the room. The other man said he was sorry and left. When the man opened the door the hall light shone on him enabling Moore for the first time to recognize him as appellant, whom Moore had known for several years (Tr. 6, 11). When Moore recognized appellant he called his name and appellant slammed the door of Moore's room and started down the steps. Moore followed him into the hall and called after him, asking what he was doing and telling him that he did not need to leave (Tr. 6, 11). Moore followed appellant down the two flights of steps to the street door but did not follow him into the street, being dressed only in his underclothes. There was another man standing at the head of the steps as appellant ran down. The second man followed appellant down (Tr. 7). Moore returned to his room and discovered that \$18.00 in cash, which

had been in the side pocket of his trousers, was missing. His wallet containing \$100.00, which was in the hip pocket of the trousers, remained. The trousers had been left hanging on a chair next to the bed (Tr. 8).

Moore reported the incident to the police sometime between 9 A.M. and noon August 14th (Tr. 14) and appellant was arrested some ten days later at Griffith Stadium (Tr. 19). Moore further testified that he next saw appellant after appellant's arrest and that when interrogated by police appellant denied that he had entered Moore's room although admitting that he had known Moore (Tr. 7, 8).

During the cross-examination of Moore, appellant's counsel offered in evidence a written statement made by Moore, apparently in the District Attorney's Office. The purpose of introducing the statement in evidence was to show that Moore did not include therein an allegation that \$18.00 was stolen but that that averment was added in ink later, thereby attempting to rebut the witness' testimony that the sum was stolen from him (Tr. 14,15,16,17).

On re-direct examination Moore testified that on every occasion when he was questioned by police and when questioned just prior to testifying before the Grand Jury he stated \$18.00 was stolen (Tr. 18).

The only other Government witness, Ernest Amos, testified to arresting appellant at the ball park some ten days after the alleged housebreaking and of questioning appellant at the thirteenth police precinct. Amos said appellant denied having anything to do with the alleged

crime (Tr. 19,20), and said that he was home in bed at the time. Appellant admitted to the officer that he was familiar with the place where Moore lived, but that he had not been there recently. He admitted knowing Moore.

The defense presented an alibi. The appellant's mother, Mrs. Alma Branch, testified that appellant was sleeping in his room at 1732 - 1st Street, N. W., at the time of the alleged crime. She explained her recollection of the date by testifying that it was the night that her other son, a lieutenant in the Army, returned to his overseas post and was also the night when Wallace Ligon, a roomer in her home, assisted her in moving a couch to another address. She said the moving took place about 2 A.M. after Ligon returned from witnessing a boxing exhibition (Tr. 27,28,29). Ligon corroborated Mrs. Branch's testimony stating that he had moved the couch for Mrs. Branch after attending the fights (Tr. 37,38). On cross-examination he said the fights were held at the ball park, but was not sure of the exact date (Tr. 39).

In rebuttal, the prosecution introduced official records of the District of Columbia Boxing Commission, which showed that the only professional fights held at the ball park during the week in question were on the 12th of August (Tr. 44,45,46,47,48,49).

Thereafter the trial justice permitted defense counsel to re-open his case, and appellant testified, denying complicity in the alleged crime and stating that he was home asleep at the time of its commission. During direct examina-

tion appellant volunteered that he was on parole and had been on parole for two and a half years. This statement was not responsive to any question but apparently was intended to support his contention that he always was home by eleven o'clock in the evening, since that was required by parole regulations (Tr. 53). He also similarly volunteered that "I told my mother about the different accusations that were being placed about me * * *." (Tr. 54). He admitted on cross-examination to being on parole from a conviction in 1942 of forgery of a United States check (Tr. 55). Then the following occurred without objection:

"Q. You say there are many other offenses you have been charged with?

"A. A few that I know of. I understand they are against me. That is all I know." (Tr. 55).

When the prosecutor pursued the subject by inquiring how many times the appellant had been charged, defense counsel objected, but the question was allowed, and the witness replied that he was "glad to tell the court" that he "was charged with 35 charges of housebreaking, all in one weekend," but had to "come to court" only on three cases. The prosecutor then asked whether appellant was not indicted in four cases, and appellant said that he had meant to say four instead of three.

Without objection and referring to the other charges, the prosecutor asked:

"Q. These officers charged you with entering people's apartments late at night, didn't they?" Appellant replied

in the affirmative (Tr. 55,56). In arguing the case to the jury, defense counsel referred to appellant's testimony concerning the 35 cases against him apparently in an effort to show that appellant was being persecuted (Tr. 70). In his rebuttal argument the Assistant District Attorney replied to the accusation of persecution by stating, "We have reduced the charges against this man to four cases." Defense counsel objected on the ground that there never had been 35 charges against appellant. The Court responded in the presence of the jury as follows:

"I do not think we will rely on that. * * * It is not persecution if there are charges against this defendant. I do not know how many charges there are against this man and I am not interested because we are trying only this one charge." (Tr. 73, 74).

STATUTES INVOLVED

Sec. 22-1801, District of Columbia Code, 1940 ed.

"Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

Sec. 22-2202, District of Columbia Code, 1940 ed.

"Whoever shall feloniously take and carry away any property of value of less than \$50, including things savoring of the realty, shall

be fined not more than \$200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered."

STATEMENT OF POINTS

This amicus curiae, after interviewing appellant and examining the various documents filed by him in this court, believes that the appellant wishes to rely upon the following points:

1. Appellant did not have sufficient opportunity to prepare his defense.
2. Appellant was incompetently represented at the trial.
3. A continuance was erroneously refused by the court.
4. Appellant's arrest was illegal.
5. Appellant was denied access to witnesses.
6. Statements made by the prosecutor relating to other charges were improper and prejudicial.
7. The trial justice erroneously refused to permit cross-examination of the witness Moore concerning the failure at the thirteenth police precinct of an eye-witness to identify appellant.
8. The written statement by the witness Moore should not have been admitted in evidence.
9. The complaining witness was a police informer, had admitted the commission of one crime and had been indicted

for others and, therefore, corroboration of his testimony should have been required.

10. The court failed to instruct the jury that they might find appellant guilty of illegal entry.

11. The testimony of the two Government witnesses was perjured and conflicting.

SUMMARY OF ARGUMENT

Cross-examination of appellant in respect of other charges of housebreaking and remarks of the prosecutor were so prejudicial as to cast doubt on the fairness of the trial. Appellant's other points either are based on matters outside of the record, and hence must be disregarded, or are patently without merit.

ARGUMENT

1. Evidence of Other Crimes

Admission of evidence that appellant had been charged with 35 other cases of housebreaking and that the other cases were similar on the facts to the one for which he was being tried could not have failed to have played a major part in persuading the jury of the appellant's guilt. This is particularly true since the physical circumstances surrounding the identification of appellant by the complaining witness made Moore's testimony far from convincing. If, then, admission of the evidence of other charges constituted error, judgment should be reversed.

The questionable evidence was elicited from appellant by cross-examination. Most of it was not objected to, and

defense counsel failed to request instructions that it be disregarded. This counsel is not unmindful that points not raised in the trial court ordinarily will not be considered on appeal, Depina v. United States, 78 U. S. App. D. C. 31, 137 F. (2d) 673, but it is equally well established that this court may correct error vitally affecting the issue of guilt even though no objection was made at trial and no curative instruction requested. Schwartz v. United States, 56 App. D. C. 105, 10 F. (2d) 900; Meadows v. United States, 65 App. D. C. 275, 82 F. (2d) 881; Mumforde v. United States, 76 U. S. App. D. C. 107, 139 F. (2d) 411, cer. den. 317 U. S. 656, 63 S. Ct. 53, 87 L. ed. 527. To the same effect is Rule 52(b), Federal Rules of Criminal Procedure.

In view of appellant's contention that he was incompetently represented at trial this case appears to be one in which the court might well disregard omissions by trial counsel and look at the substance of the record to determine whether appellant was afforded a fair trial.

The testimony in question was admitted on the theory that appellant voluntarily opened up the subject of other charges against him (Tr. 55, 56). The record is by no means clear that such was the case. Appellant volunteered that he told his mother "about the different accusations that were being placed about me. * * *", but this falls far short of stating that he had been charged with the commission of other crimes. It is apparent from the inquiry of the prosecutor, "You say there are many other offenses you have been charged with?", and his subsequent questions, that he seized

upon appellant's chance remark as an excuse to develop for the jury the fact that the police had suspected appellant of committing many other cases of housebreaking.

Although defense counsel did not object to the first question of the prosecutor, when the prosecutor attempted to develop the subject further, he did object and was promptly overruled by the court on such terms as to lead him to believe that further objections to the entire line of questioning would be futile (Tr. 55,56).

It is, of course, obvious that the other cases of housebreaking had no possible evidentiary connection with the case for which appellant was being tried and that the only purpose of their mention was to bolster the Government's case. The fact that 35 charges of housebreaking had been placed against appellant constituted hearsay evidence of his commission of other crimes. This could not have failed to have left the the impression in the minds of jurors that appellant had a disposition to crime of the same character as that for which he was being tried. That it was the purpose of the prosecutor to achieve this end was made crystal clear by his further question, "These officers charged you with entering peoples' apartments late at night, didn't they?" The jury could not escape the implication that appellant not only was predisposed to crimes of housebreaking, but also to the same methods allegedly employed in the case at bar.

Reliance by defense counsel in his argument to the jury upon the 35 other cases of housebreaking to show that appellant was being persecuted cannot justify the original admission of

the evidence, since the damage by that time had already been done, and defense counsel could only make the best of an already bad situation. Remarks by the court, when defense counsel objected to the prosecutor's argument that the charges against appellant had been reduced to four cases (Tr. 73,74), did nothing to clear the minds of the jurors of the prejudice which must have been engendered by the original introduction of the evidence.

It is true that this court has held that evidence of a prior arrest, standing alone, was not sufficient for reversal in the face of clear and convincing evidence of guilt. Howe v. United States, 61 App. D. C. 8, 56 F. (2d) 305. Here, however, there was no such overwhelming evidence of guilt as existed in the Howe case. Less damaging evidence of other crimes than that in the case at bar has led this court to reverse convictions in other cases. Robinson v. United States, 57 App. D.C. 143, 18 F. (2d) 185; Smith et al. v. United States, 67 App. D. C. 251, 91 F. (2d) 556; Laughlin v. United States, 67 App. D. C. 355, 92 F. (2d) 506; Boyer v. United States, 76 U. S. App. D. C. 397, 132 F. (2d) 12.

2. Other Points Made by Appellant

Points 1, 3, 4, 5, 9, and 11 have absolutely no basis in, or support by, the record and, therefore, cannot be passed upon by this court. Beach v. United States, 80 U. S. App. D. C. 160, 149 F. (2d) 837.

Appellant's point No. 7 concerning alleged refusal of the trial justice to permit cross-examination of the complaining witness concerning the identity and statements of

an absent witness is not supported by the record, but apparently was based on the colloquy reported at p. 17 of the transcript.

The written statement of the complaining witness was offered in evidence on behalf of the defendant and, therefore, he can not now object to its admission.

The contention of appellant that the court below should have instructed the jury that they might find appellant guilty of illegal entry is made for the first time in this court, no request for such instruction having been made during the trial. Even aside from this aspect of the matter, however, it appears that the instructions of the court were entirely proper. The effect of the court's charge was that the jury must find appellant not guilty if they concluded that any of the elements of housebreaking, including the intent to commit the crime, was lacking (Tr. 79, 80). Inasmuch as appellant's defense was an attempt to prove an alibi, any instruction with respect to illegal entry would have been inappropriate.

Appellant's criticism of his counsel does not appear justified by the record. Errors of commission or omission by counsel are difficult if not impossible to appraise accurately upon the cold record and unless incompetency is patent cannot be availed of as a ground for reversal on appeal. Burton v. United States, 80 U. S. App. D. C. 208, 151 F. (2d) 17.

CONCLUSION

Laying aside the injection into the case of other charges against the appellant, the record discloses that appellant was not deprived of any essential right. It is respectfully submitted, however, that the cross-examination of appellant concerning other charges against him so closely approached limits which should not be transgressed as to warrant careful scrutiny by this court.

Respectfully submitted,

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